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IN THE

United States Supreme Court

October Term, 1965

No. 322

HAROLD A. STEVENSON, et al.,

Petitioners,

v.

LOUIS SILVERMAN, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

LAWRENCE J. RICHETTE,
Counsel for Petitioners

2210 Girard Trust Building,
Philadelphia 2, Pennsylvania

Martin Lutz Appellate Printers, Inc.
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OPINIONS BELOW

Chancellor's Opinion, dated July 31, 1964 is not reported below (R. 24a-27a). The Opinion of the Supreme Court of Pennsylvania (infra, Appendix A) is reported at 417 Pa. 187 (1965).

JURISDICTION

1. The Opinion and Order of the Supreme Court of Pennsylvania was entered on March 16, 1965.

2. The Petition for Reargument before the Pennsylvania Supreme Court was denied April 16, 1965.

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Where a husband is the sole party in a declaratory judgment action pleading that he gained title to land by adverse possession and the court concludes as a

matter of law that he did not, does not a sister court deprive the parties of due process of law guaranteed by the Fourteenth Amendment when it rules that res judicata bars a second action in which the wife and children and their spouses join the husband who plead that title is in all of them by virtue of "tacking" of several adverse holdings?

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution is set forth in Appendix B.

HOW THE FEDERAL QUESTION WAS RAISED

In the printed brief of appellants (petitioners) pp. 4-15, where the Fourteenth Amendment is raised.

STATEMENT OF CASE

In November 1958 for the purpose of redeveloping a blighted section of the city, Philadelphia condemned 64 acres of ground in accordance with federal urban renewal laws. In 1959 one Harold A. Stevenson filed a declaratory judgment action in one of Philadelphia's common pleas courts, pleading that he had complied with the law of adverse possession, and asked the court to declare him the title owner of this ground. The case went to trial, without a jury, and the chancellor entered a verdict against Stevenson. The attorney for Stevenson sought and received from the Supreme Court a directive to the lower court to compel it to write an adjudication. The case received national attention in the press, radio, and television. This case sparked investigations in the press of the activities of certain ward politicians, who were of the same political faith as the chancellor, who had

acquired title to the ground several months prior to the condemnation, without consideration.

During the trial Stevenson's attorney attempted to amend the pleadings; the court refused any amendment, but did allow testimony which showed that Stevenson's wife, several children and their spouses had occupied the ground for different periods. However, since only Stevenson was the party-plaintiff, and the pleadings averred that only he had complied with the law of adverse possession, the chancellor made conclusions of law finding that Stevenson had failed to prove title was in him by adverse possession.

The Supreme Court of Pennsylvania affirmed the chancellor at 412 Pa. 478 (1963), holding that the findings of a chancellor will not be disturbed on appeal. It totally ignored the charges of perjury and subornation of perjury, the efforts of the lower court in holding counsel in contempt, the charges leveled at that lower court for the breach of judicial ethics.

A new suit was started. This time Harold A. Stevenson and his wife Elsie were parties, and joined with them were a son, Earle C. Stevenson and his wife Ellen, and a daughter Gloria Wydrznyski and her former husband, Richard J. Ferrell. The pleadings averred that title by adverse possession to the 64 acres of farm land became theirs because of the doctrine of "tacking."*

The lower court dismissed the second suit, holding that members of the family were privies, and

* "Where a family has lived in continuous adverse possession of land the title being in one of them or in different members of the family at different times, they stand in such privity one to another that the tacking of their possessions is permissible." *Shaffer v. Baylor's Lake Assoc.*, 392 Pa. 493 (1958) at 498.

hence were bound by the judgment in the first action. The Supreme Court of Pennsylvania affirmed at 417 Pa. 187 (1965).

The ground is valued at more than one million dollars.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Pennsylvania courts chose to use the word "privy" contrary to its own decisions and the decisions of this court. In Strayer v. Johnson, 110 Pa. 21 (1885) at 24 the court said:

> "Privies are those whose relationship to the same right of property is mutual or successive. In other words, privity denotes mutual or successive relationship to the right of property title or estate."

In Stacey v. Thrasher, 47 U.S. 44, 6 How. 44, 12 L.Ed. 337 (1848) the court said the same thing: "Privity ... denotes mutual succession or relationship to the same rights of property." This definition is uniform in Anglo-American jurisprudence.

By incorrectly calling the new parties in the second suit privies, it prevented the parties from having their day in court. Harold A. Stevenson was the only party in the first action. The pleadings averred that only he had complied with the law of adverse possession. The conclusions of law held that he had failed to prove that he had title to the ground by adverse possession.

Applying the doctrine of res judicata to the parties in the second suit on the theory that they were privies to Harold Stevenson not only totally ignored the averments in the pleadings that each couple held adversely

for a separate period and that when those periods are added together the twenty-one year requirement is met, but the erroneous application of the doctrine also ignored the universal rule of law of co-tenants. In Corpus Juris Secundum, Judgments §795 this is found:

> "Co-tenants. As a rule there is no privity between joint tenants or tenants in common with respect to application of the rule of res judicata.
>
> "Joint tenants or tenants in common do not claim through or under each other and therefore there is no such privity between them that a judgment for or against one of them affecting the land will bind the other. Neither a recovery of his aliquot portion of damages by one joint owner of a chattel in an action for tort, nor a judgment against him alone, in such action will bar a separate action by another part owner."

The Restatement on Judgments is to the same effect. Section 103 reads:

> "Except in the case of a bailment, a judgment for or against one of several persons having property interests, in an action by or against him with reference to the title to the subject matter or for harm to it, does not merge or bar the claim by or against the other co-owner or make res adjudicata as to the others any matter adjudicated in the action."

Pennsylvania has consistently held that a decree must conform to the case as made out by the pleadings and prayer. Truscott v. Yiddisher, 382 Pa. 553 (1955). Because the lower court in the first action discussed in its opinion and certain of its

factual findings (R. 40a-70a) the several holdings of the children of Harold Stevenson, the Supreme Court of Pennsylvania ruled that the new parties were bound by the judgment in the first action.

In doing so, Pennsylvania has deprived the parties in the second action of due process as guaranteed by the Fourteenth Amendment to the Constitution. As this court said in Hansberry v. Lee, 311 U. S. 32 (1940) at 40:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.
>
> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."

At 46:

> "The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others."

This Court early stated the rule of Depasseur v.

Rochereou, 88 U.S. 130, 21 Wall. 130, 22 L.Ed. 588 (1874): "... no persons are bound by a judgment or decree except those who are parties to it."

The pleadings in the second suit simply aver that three different couples, related by blood, hold title by adverse possession as co-tenants — or tenants in common — and that this was achieved by the tacking of several separate holdings: Harold A. Stevenson and his wife from 1928 to 1937, Gloria Wydrznyski and her husband from 1937 to 1947, Earle C. Stevenson and his wife from 1947 to 1952, and Harold A. Stevenson and his wife from 1952 to the date of condemnation 1958 (R. 13a-15a). They are not privies as this court has defined privies. There are separate rights averred here. Plaintiffs do not seek to relitigate the rights of Harold A. Stevenson; they do not say their rights stem from Harold A. Stevenson. They say their rights are co-equal to each other, and when those rights are added together they meet the requirement of Pennsylvania law as to adverse possession by members of a family. Shaffer v. Baylors' Lake Assoc., supra.

The parties are different in the second suit. For the first time all members of the family are before the court asking that their separate rights be adjudicated.

The prayer is different. The parties seek a judicial declaration that title is in all of them by the tacking of their several adverse holdings.

The parties here are not privies, nor are they seeking the mutual or successive interest that Harold A. Stevenson pleaded in his first suit. The parties are new, and they plead something new. They are entitled to their day in court. The judgment of the

first suit should not bar them from litigating their rights for the first time.

The lack of due process in the summary dismissal of this second suit and the failure to satisfy constitutional safeguards not only have deprived petitioners of fundamental rights, but have also destroyed stability in the application of property laws.

CONCLUSION

It is therefore respectfully submitted that this case is a proper one for review by certiorari in this court and that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE J. RICHETTE
2210 Girard Trust Building
Philadelphia 2, Pa.

APPENDIX A

PENNSYLVANIA SUPREME COURT OPINION

Opinion by Mr. Justice Eagen, March 16, 1965:

This is an appeal from an order below dismissing a petition for a declaratory judgment.

This is the factual background.

On June 4, 1959, Harold Stevenson filed a petition for a declaratory judgment (to No. 199 June Term 1959) in the Court of Common Pleas of Philadelphia County, praying that he be declared the owner of 64 acres of land in the Eastwick section of Philadelphia. After answer filed, a trial, consuming twenty-four days, ensued. Subsequently, the action was dismissed and judgment entered for the defendants. On appeal, we affirmed, 412 Pa. 478, 195 A.2d 268 (1963).

In that action, the plaintiff, Stevenson, claimed title to the land involved because he or members of his immediate family had been in continuous, open, exclusive, and hostile possession thereof for more than twenty-one years, and, therefore, he was the owner by adverse possession. Stevenson did not maintain or attempt to establish that he personally was in possession for the entire twenty-one year period, but he did urge, and offer testimony to establish, that he was in possession for a portion of the required period, and that members of his family were in successive possession for an additional period of time which, when added together, satisfied the twenty-one year requirement. In other words, the plaintiff's case depended "upon the theory of 'tacking'; that is, that the plaintiff and members of his family together had accomplished that which the

law required in adverse possession." Brief for Appellant, p. 69, Stevenson v. Stein, 412 Pa. 478, 195 A.2d 268 (1963). This was the issue raised both by the pleadings and the proof.

At trial, plaintiff offered not only his own testimony to prove the claim, but also that of each and every member of his family who allegedly joined in the successive possession of the land. Many witnesses were offered in contradiction. The lower court decided the issue on the merits and found, inter alia, that neither "the plaintiff or his privies" (members of his family) were in continuous possession "of any part of the land" for the required twenty-one year period, and therefore concluded that one of the necessary elements of adverse possession had not been established.

Shortly after our affirmance of the lower court's findings and judgment, the present proceedings were instituted. The facts alleged herein are precisely identical with those Stevenson sought to establish in the prior action. These are the only differences in the two proceedings: 1) In the first, Stevenson claimed ownership for himself, and hence was the only party-plaintiff, whereas in the instant proceeding, joint ownership is claimed on behalf of all members of the family who allegedly joined in the successive possession, and all these individuals are now named plaintiffs; 2) Additional parties are named defendants; and, 3) The land claimed has been reduced in area from a total of 64 acres to approximately 62.5 acres.

The lower court dismissed the present action on the principle of res judicata. This order was definitely correct.

For the doctrine of res judicata to prevail, there

must be a concurrence of four conditions: 1) Identity in the thing sued upon; 2) Identity of the cause of action; 3) Identity of persons and parties to the action; and, 4) Identity of the quality or capacity of the parties suing or sued: Burke v. Pittsburgh Limestone Corp., 375 Pa. 390, 100 A.2d 595 (1953), and Fisher Building Permit Case, 355 Pa. 364, 49 A.2d 626 (1946). There can be no doubt but that the present action is an attempt to relitigate the same cause of action, and that all conditions, enumerated above, exist in the present situation, except No. 3, i.e., additional parties-plaintiff and defendants appear in the second action. However, under the facts, the principle still controls. The doctrine of res judicata applies to and is binding, not only on actual parties to the litigation, but also to those who are in privity with them. A final valid judgment upon the merits by the court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action: Goldstein v. Ahrens, 379 Pa. 330, 108 A.2d 693 (1954); Burke v. Pittsburgh Limestone Corp., supra; Loughran v. Matylewicz, 367 Pa. 593, 81 A.2d 879 (1951); and, Central Pa. Lumber Co. v. Carter, 348 Pa. 429, 35 A.2d 282 (1944). As stated in Goldstein v. Ahrens, 379 Pa. at 334, 108 A.2d at 695: "When a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered and not reversed on appeal is, as between the parties to the suit and their privies, final and conclusive with regard to every fact which might properly be considered in reaching a judicial determination and with regard to all points of law adjudged as those facts and points of law relate directly to the cause of action in litigation." (Emphasis supplied).

The members of Stevenson's family, who are now added as parties-plaintiff, were treated and considered

by the lower court in the first proceeding as acting in privity with him. On appeal, this Court considered and determined the issue on the same basis. The interest of each and every one was involved and adjudicated. The record permitted no other reasoning. All members of the family had a mutual interest in the action, were present, and joined and participated fully in the prosecution of the litigation. It was an endeavor by, for and on behalf of each and every one. On no other theory could the plaintiff's case have prevailed. Not only was it necessary for the plaintiff to establish that the successive occupants had possessed the property for the full statutory period, but also that privity existed among them. Privity among the adverse possessors was a necessary link to the establishment of the claim. See, Graffius v. Tottenham, 1 W. & S. 488 (1841); Watson v. Gregg, 10 Watts 289 (1840); Stark v. Lardin, 133 Pa. Superior Ct. 96, 1 A.2d 794 (1938); and, 2 C.J.S. Adverse Possession §129 (1936).

The doctrine of res judicata is based on public policy and seeks to prevent an individual from being vexed twice for the same cause. If any case calls for its application, this is it. As pertinently stated in Hochman v. Mortgage Fin. Corp., 289 Pa. 260, 263, 137 A. 252, 253 (1927): "The rule should not be defeated by minor differences of form, parties or allegations, when these are contrived only to obscure the real purpose, — a second trial on the same cause between the same parties. The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights. If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule." (Emphasis supplied).

The cause and rights of all involved have been determined finally. The case should at long last rest in peace.

Order affirmed.

APPENDIX B

Fourteenth Amendment to the United States Constitution: "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENTS IN OPPOSITION.

SAMUEL D. SLADE,
GEORGE P. WILLIAMS, III,
JEROME J. SHESTACK,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102
Attorneys for Respondents, Louis Silverman, Elias H. Stein and Samuel R. Rosenbaum.

SIDNEY B. GOTTLIEB,
818 Widener Building,
Philadelphia, Pennsylvania. 19107
Attorney for Respondents, Leonard A. Gottlieb and Leon J. Slonimsky.

Of Counsel:
SCHNADER, HARRISON, SEGAL & LEWIS,
1719 Packard Building,
Philadelphia, Pennsylvania. 19102

International, 711 So. 50th St., Phila., Pa. 19143

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The Chancellor's Opinion (R. 24a-26a) is not reported. The Opinion of the Supreme Court of Pennsylvania in the instant case (Pet. App. A) is reported at 417 Pa. 187 (1965).[1]

1. The disposition of this case by the courts below derives from an earlier case. The trial court's opinions in that first case are set forth at R. 36a-72a and R. 73a-79a. The Opinion of the Supreme Court of Pennsylvania in the first case is set forth at R. 80a-86a and is reported at 412 Pa. 478 (1963).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on March 16, 1965, and the Petition for Reargument was denied on April 16, 1965. The petition for a writ of certiorari was filed on July 7, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Whether the Supreme Court of Pennsylvania erred in refusing to permit the relitigation of an adverse possession suit where the second suit was identical in all critical respects with the first except that the plaintiff added to the caption the names of members of his family who had in fact participated in the first suit.

STATEMENT.

In June 1959, Harold Stevenson filed suit seeking a declaratory judgment that he was the owner by adverse possession of a 64-acre tract of land in Philadelphia (R. 27a-35a). A 24-day trial was held and testimony covering more than 4,000 pages of record was heard by the Chancellor (R. 38a).

In his petition, Stevenson had alleged that he personally had been in "actual, continuous, exclusive, visible, notorious, distinct, and hostile adverse possession" of the land since September 19, 1928 (R. 30a). However, as explained by the Chancellor in that case, at the trial Stevenson "* * * changed his position and definitely relied on the theory of tacking and he made no claim that he alone was in continuous possession of the land. His theory at trial was that first he, then daughter and son-in-law, then his son and finally he again occupied the land" (R. 56a).

In support of this contention, Stevenson offered his own testimony, and the testimony of the individual members of his family as noted by the Chancellor. The Chancellor rejected the contention and held that "* * * it is clear that even under the plaintiff's theory of tacking, he and his privies failed to maintain continuous and uninterrupted possession of the land" (R. 56a).[2] This holding was fully supported by extended specific findings of fact (R. 40a-47a), including the finding that "* * * [m]any disinterested witnesses proved that there was no visible possession by plaintiff or his privies during the years 1930 to 1936, 1946, 1947 and 1948" (R. 47a).

On October 9, 1963, these findings by the Chancellor were approved by the Supreme Court of Pennsylvania (R. 83a-85a). Once again, it was made clear that the claim under adjudication was one of adverse possession, by "tacking" by Stevenson and "* * * his privies (members of his immediate family)" (R. 83a). Describing the issue as "* * * purely factual * * *" (R. 84a), the Supreme Court of Pennsylvania concluded that there was "* * * no meritorious reason to interfere with the findings in this case" (R. 85a).

On February 19, 1964, the suit here involved was instituted (R. 2a). This time, the petition for a declaratory judgment (R. 4a-20a) formally alleged the theory upon which the first suit had actually been tried and decided, namely the contention that one or another of the members of Stevenson's family had been in possession of the tract throughout the 21-year period and that, on the theory of "tacking", the Stevenson family was entitled to be declared owners of the tract (R. 4a-6a, 13a-16a). In an effort to differentiate this new suit from the first suit, Stevenson formally joined, as named plaintiffs, his wife, his daughter

2. There were other grounds for the Chancellor's rejection of Stevenson's claim, such as failure to prove hostile possession (R. 56a) and the failure to carry the burden of proving that the possession was notorious, open or visible (R. 64a-65a).

and former son-in-law, and his son and daughter-in-law. The members of Stevenson's family—who had been described by the Supreme Court of Pennsylvania in the first suit as Stevenson's "privies" (R. 83a)—had testified in the first suit in support of Stevenson's claim that, in combination, they had occupied the tract for the prescriptive period (R. 22a) and their testimony had been the subject of specific Findings by the Chancellor in that suit (*e.g.*, R. 47a).

On July 31, 1964, this second suit was dismissed on the ground that it was barred by the principle of *res adjudicata* (R. 24a-26a) and, on March 16, 1965, this decision was affirmed by the Supreme Court of Pennsylvania (Pet. App. pp. 10-13). In an opinion for a unanimous court, Mr .Justice Eagen stated (Pet. App. pp. 11-13):

> "The members of Stevenson's family, who are now added as parties-plaintiff, were treated and considered by the lower court in the first proceeding as acting in privity with him. On appeal, this Court considered and determined the issue on the same basis. The interest of each and every one was involved and adjudicated. The record permitted no other reasoning. All members of the family had a mutual interest in the action, were present, and joined and participated fully in the prosecution of the litigation. It was an endeavor by, for and on behalf of each and every one. On no other theory could the plaintiff's case have prevailed. Not only was it necessary for the plaintiff to establish that the successive occupants had possessed the property for the full statutory period, but also that privity existed among them. Privity among the adverse possessors was a necessary link to the establishment of the claim. See, *Graffius v. Tottenham*, 1 W. & S. 488 (1841); *Watson v. Gregg*, 10 Watts 289 (1840); *Stark v. Lardin*, 133 Pa. Superior Ct. 96, 1 A. 2d 794 (1938); and, 2 C. J. S. Adverse Possession § 129 (1936).

"The doctrine of res judicata is based on public policy and seeks to prevent an individual from being vexed twice for the same cause. If any case calls for its application, this is it. As pertinently stated in *Hochman v. Mortgage Fin. Corp.*, 289 Pa. 260, 263, 137 A. 252, 253 (1927): 'The rule should not be defeated by minor differences of form, parties or allegations, when these are contrived only to obscure the real purpose,—a second trial on the same cause between the same parties. The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which *the present parties actually had an opportunity to appear and assert their rights.* If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule.' (Emphasis supplied.)

"The cause and rights of all involved have been determined finally. The case should at long last rest in peace."

Argument.

There are occasions upon which it can be seriously contended that application of the doctrine of *res judicata* gives rise to problems of due process. *Cf.* **Hansberry v. Lee**, 311 U. S. 32 (1940). But the instant case presents no such occasion. To the contrary, as Justice Eagen remarked in the opinion below, if any case ever called for the application of the doctrine of *res judicata*, "* * * this is it" (Pet. App. p. 12).

The conclusion reached by Justice Eagen is compelled by any candid and fair examination of the course of the two adverse possession lawsuits here involved. However, in an attempt to undermine this conclusion, petitioners place before this Court an entirely misleading version of that course of events.

It is true that the initial pleading in the first adverse possession suit alleged continuous adverse possession by Harold A. Stevenson alone. But, contrary to the inference contained in the petition (Pet. p. 3), it is not true that the first suit was tried on this limited basis. Whether or not formal amendments to the pleadings were allowed, the first suit was not decided on the basis of a variance between pleading and proof. To the contrary, the first suit was fully tried on the theory of "tacking" and evidence of "tacking" was considered and rejected on the merits. As the Chancellor there stated (R. 56a):

> "* * * We need not decide, however, whether this variance between the allegata and the probata is fatal to plaintiff's claim since it is clear that even under the plaintiff's theory of tacking, he and his privies failed to maintain continuous and uninterrupted possession of the land."

Second, there is no justification for the suggestion by petitioners (Pet. pp. 4-5) that members of the Stevenson

family were designated as Harold A. Stevenson's "privies" for the first time in the second suit. They were referred to throughout the first suit as his "privies" and were specifically described as "privies" by the Supreme Court of Pennsylvania in its Opinion in the first suit (R. 83a).

Turning then, to the petition for certiorari, petitioners' basic claim is that they have been deprived of their day in court, and they assert that the validity of this claim is to be measured solely by a comparison of the initial pleading in each lawsuit. Such a contention is completely without merit. As the facts set forth above make clear, the Stevenson family has had its day in court. After a trial lasting 24 days, the trier of fact found that the Stevenson family had not acquired title to the tract by adverse possession. The interests of the entire Stevenson family were fully and adequately represented in this first lawsuit, a suit in which the entire family participated. Under familiar principles of law, the prior judgment in that suit bars Stevenson and his privies from bringing this second suit. As this Court said in **Commissioner v. Sunnen**, 333 U. S. 591, 598 (1948):

> "* * * matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. * * *"

Certainly no serious questions of denial of due process arise from this simple application of basic principles of the common law. Nor does this case fit any of the standard criteria which this Court uses in determining whether it should devote its valuable time to consideration of a case on the merits. To the contrary, the basic controversy here was factual in nature. In the first suit, two courts considered every contention at length and rejected the claim of adverse possession. No application for certiorari was made from the decision of the Supreme Court of Pennsylvania

in that action and, had such an application been made, review on these factual issues would have been barred by the "two-court" rule. **Pick Mfg. Co. v. General Motors Co.**, 299 U. S. 3 (1936). Instead, a collateral attack has been launched in the form of this second suit, clearly barred by the principle of *res judicata*. In Pennsylvania, as in all jurisdictions, the doctrine is designed to prevent the relitigation of causes which have been thoroughly considered and put at rest by the final judgment of a court of competent jurisdiction. As this Court said in **Stoll v. Gottlieb**, 303 U. S. 165, 172 (1938): "* * * It is just as important that there should be a place to end as that there should be a place to begin litigation * * *."

CONCLUSION.

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

SAMUEL D. SLADE,
GEORGE P. WILLIAMS, III,
JEROME J. SHESTACK,
Attorneys for Respondents, Louis Silverman, Elias H. Stein and Samuel R. Rosenbaum.

SIDNEY B. GOTTLIEB,
Attorney for Respondents, Leonard A. Gottlieb and Leon J. Slonimsky.

Of Counsel:

SCHNADER, HARRISON, SEGAL & LEWIS.